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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

MISSOURI ON THE MAINLAND, INC.,
a Washington nonprofit corporation,

Petitioner,

v.

RICHARD DANZIG, Secretary of the Navy; UNITED STATES DEPARTMENT OF THE NAVY, Inspector General; GENERAL SERVICES ADMINISTRATION, Chief Administrator; COMPTROLLER GENERAL, General Accounting Office,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, as a case of first impression before this Court, 10 U.S.C. § 7306 is unconstitutional in violation of Art. I when Congress reserved unto itself a Congressional veto by requiring that the Secretary of the Navy give notice of donation of a vessel to the Congress and that the Secretary follow strict time limits for that notice to the Congress, and, if so, does the Petitioner have standing to assert this unconstitutionality under the element of redressability?

Whether 40 U.S.C. § 474 (cited to in 10 U.S.C. § 7306) vests in the Administrator of the General Services Administration the power and authority to dispose of a Navy vessel when the vessel has been stricken from the Naval Vessel Registry, and, if so, does the Petitioner have standing to assert this claim?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Missouri on the Mainland, Inc., a Washington nonprofit corporation, which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondents are the Honorable John Dalton (now Richard Danzig as substituted), the Secretary of the Navy; United States Department of the Navy, Inspector General; General Services Administration, Chief Administrator; and, Comptroller General, General Accounting Office.

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Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Filed August 31, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Washington At Tacoma Granting Defendants' Motion To Dismiss Filed November 4, 1998 ..... 5a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is unreported. The district court opinion (App. B) is also unreported.

STATEMENT OF JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals was entered on August 31, 2000. The date extending the time for filing the within Petition was granted by the Honorable Sandra Day O'Connor, Associate Justice, on November 15, 2000, to December 29, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

***Statutes*:**

10 U.S.C. § 7306. Vessels stricken from Naval Vessel Register; captured vessels: transfer by gift or otherwise.

(a) Authority to make transfer. — Subject to subsections (c) and (d) of section 602[1] of the Federal Property and Administrative Services Act

1. There is no section "602" in the said Act, either in 1949 or by amendment.

of 1949 (40 U.S.C. § 474), the Secretary of the Navy may transfer, by gift or otherwise, any vessel stricken from the Naval Vessel Register, or any captured vessel, to —

(1) any State, Commonwealth, or possession of the United States, or any municipal corporation or political subdivision thereof;

(2) the District of Columbia; or

(3) any not-for-profit or nonprofit entity.

(b) Vessel to be maintained in condition satisfactory to Secretary. — An agreement for the transfer of a vessel shall include a requirement that the transferee will maintain the vessel in a condition satisfactory to the Secretary.

(c) Transfers to be at no cost to United States. — Any transfer of a vessel under this section shall be at no cost to the United States.

(d) Notice to Congress. — (1) No transfer under this section takes effect unless —

(A) notice of the proposal to make the transfer is sent to Congress; and

(B) 60 days of continuous session of Congress have expired following the date on which such notice is sent to Congress.

(2) For purposes of paragraph (1)(B), the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.

40 U.S.C. § 472. Definitions

As used in titles[2] I through VI

. . .

(d) The term "property" means any interest in property except

. . .

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2. The word "Titles" is not defined in the Act. There is no other reference in the Act to what the word "Titles" means. The word "Titles" ordinarily means the first numeral designation of a volume of a U.S. Code. If the word "Chapters" is substituted for "Titles", the reference would be appropriate in terms of the Roman numerals cited to. The "Chapters" are very badly drafted and are largely incomprehensible. See Argument II.

(2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines.[3]

40 U.S.C. § 474. Congress, departments, agencies, corporations, and persons exempted from provisions

The authority conferred by this Act shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith, except as otherwise provided by the Office of Federal Procurement Policy Act (41 U.S.C.A. § 401 et. seq.), and except that sections 486(b) and 487(c) of this title shall not be applicable to any Government corporation or agency which is subject to chapter 91 of Title 31.

Nothing in this Act shall impair or affect any authority of —

. . .

(3) any executive agency named in chapter 137 of Title 10, and the head thereof, with respect to the administration of said chapter; (Attorney's Note: This refers to "procurement generally");

(4) the Department of Defense with respect to property required for or located in occupied territories;

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3. This section was cited to by the Ninth Circuit in its opinion. This section does not otherwise appear in any of the formal actions of the Secretary of the Navy authorizing his actions. Because of the Ninth Circuit, this statute is included in the within Petition.

(5) the Secretary of Defense with respect to the administration of the National Industrial Recovery Reserve Act of 1948 (50 U.S.C.A. § 451 et. seq.)

(6) the Secretary of Defense, the Munitions Board, and the Secretaries of the Army, Navy, and Air Force with respect to the administration of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596) (50 U.S.C.A. § 98 et. seq.);

. . .

(8) the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force with respect to the administration of section 1171(b) of Appendix to Title 50; (Attorney's note: This Code section has been repealed)

Regulations:

41 C.F.R. § 101 — 44.108-9(b)(2)(iii)

Naval vessels of the following categories shall not be donated: Battleships, cruisers, aircraft carriers, destroyers, and submarines.

STATEMENT OF THE CASE

The subject of this Petition is the alleged donation of the ex-Battleship MISSOURI[4] ("THE MO") to a private

4. In 1996, the Secretary of the Navy ordered the USS MISSOURI (BB-63) stricken from the Navel Vessel Register of ships and with that action the "USS" and the hull number reference are stricken, leaving the battleship designated as "ex". See decision of the District Court at App. B, p. 6a.

organization in Hawaii called "Missouri Memorial Association" ("MMA"). The final act of World War II was conducted on September 2, 1945, on the decks of THE MO in Tokyo harbor when the Japanese government formally surrendered. Except for brief periods of activation during the Korean War and the Viet Nam War, the MO has been moored continuously at Bremerton, Washington, for some 40 years where it has become a symbol not only of the historic end to World War II for the entire United States, but, especially, for the Bremerton, Washington, area where it was open for visits and tours. Bremerton is a "Navy Town" having played a significant role in the berthing, repair, and provisioning of Naval ships since the early 1900's to date and is extremely proud of the vital role its people played in winning World War II. Thousands of visitors came to THE MO while it was berthed at Bremerton over the years.

After 1996, the Secretary of the Navy commenced an alleged "donation" process to transfer THE MO to interested parties and solicited proposals. On August 21, 1996, the alleged "title" to THE MO was transferred to MMA. Prior to this, four other parties submitted proposals, including the "Kitsap County Historic Battleship Missouri Public Corporation" (also referred to as the "Save the Missouri Committee") representing the Bremerton area. After the alleged donation to MMA but before transfer of THE MO, "Missouri on the Mainland, Inc.", a Washington nonprofit corporation, ("MOM") was formed on January 9, 1997, and was the successor in interest to the "Save the Missouri Committee". Its members were to some degree coextensive with "Save the Missouri" and others from the Kitsap County/ Bremerton area became members. The District Court below correctly stated that its purpose was "to Perpetuate the historical event of the 50th anniversary of the ending of World

War II on September 2, 1945, and to keep THE USS MISSOURI ON THE MAINLAND, USA." MOM actively sought to prevent the transfer of THE MO to MMA through various agencies of government. On May 23, 1998, THE MO was towed from Bremerton to Honolulu, Hawaii, where it remains as of this date.

On May 20, 1998, that activity of MOM culminated in the filing of a complaint in U.S. District Court seeking Declaratory Relief that the alleged "donation" process by the Secretary of the Navy was unconstitutional and in violation of statute. Jurisdiction was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 2201, 5 U.S.C. § 701 and 5 U.S.C. § 702. The Defendants named above filed a motion to dismiss under CR 12(b)(1), and the district court entered judgment of dismissal. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. UNCONSTITUTIONALITY OF STATUTE

A. Policy:

MOM relies on United States Supreme Court Rule 10(c) wherein ". . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . ."

This case presents a case of first impression before this Court involving statutes and regulations the subject of which is, generally, the disposal of military vessels, vehicles, and hardware. Except for the two unreported decisions of the Courts below, there is no reported case authority whatsoever,

and none others known which are unreported, dealing with the statutory or regulatory procedures or the rights of the military service secretaries and the General Services Administration to dispose of military property.

As to the Navy and with some 380 ships presently in commission service, the procedures and statutes for disposal are bound to come into controversy in the future between and among claimants and the Secretary of the Navy and/or the General Services Administration. In addition, ships not presently in commission and stricken from the registry, such as THE MO (and numerous others spread around the coastal areas of the United States and its territories and possessions), are very likely to be the subject of legal actions by various interested groups, similar to MOM, and claiming the same theories and relief, if for no other reason than for historical interest. Among the various aircraft carriers now being named for Presidents and other prominent individuals, the various other vessels named after States, and various other vessels named after cities, the resolution of the issue of standing to apply for and contest actions as to these ships, as well as the interest of the service secretaries in following lawful and proper statutory procedures, and not the least of which is the prevention of the kind of injustice which has occurred to MOM and the Bremerton area and to other areas comes into sharp focus by this case.[5]

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5. If there was ever an area which could make a claim in the nature of a prescriptive right to a Naval vessel, whether in commission or stricken from the registry, Bremerton is the area as to THE MO.

B. Unconstitutionality Of 10 U.S.C. § 7306:

10 U.S.C. § 7306 is the statute under which the Secretary of the Navy allegedly proceeded to donate THE MO. The reason this statute is unconstitutional is that on its face this statute reserves a Congressional veto to itself as to the actions of the Secretary of the Navy. That it is a Congressional veto retained in the statute is plain by the language in Sub-section (d)(1)(A), "No transfer under this section takes effect unless — (A) notice of the proposal to make the transfer is sent to Congress." It is apparent by this language that the Congress reserved unto itself the right to legislate further with respect to the actions of the Secretary of the Navy and further reserved in itself the right to overturn the actions of this Department of the Navy of the Executive Branch. That this is what the Congress intended is further supported in Sub-section (d)(1)(B) and (d)(2) by an elaborate recital of the time periods in order to allow the Congress time to act on such a notice of any such donation. The reason for the notice and notice time-period on its face can only be to allow time for the Congress to act for purposes of overturning any decision of the Secretary of the Navy.

This statute is unconstitutional as reserving unto the Congress a Congressional veto of an action of the executive Branch. This Court has clearly held that such action by the Congress is unconstitutional in violation of Article I. *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

The Ninth Circuit committed error by not finding this statute unconstitutional. The Court stated: "Even if the district court were to rule that the statute is unconstitutional

and that the donation was void, the Navy would be under no obligation to return the Missouri to the west coast." (App. A, at p. 4a).

Instead, the Ninth Circuit avoided such a holding and held against MOM on the issue of standing and, specifically, to "redressability". This Court has clearly stated that when the Constitutionality of a statute is at issue, the requirement for redressability is relaxed. *Chadha, supra. See also Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); *Department of Commerce v. House of Representatives*, 525 U.S. 316, 119 S. Ct. 765, 142 L. Ed. 2d (1999); *Buckley v. American Constitution Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).

Steel has held that standing is jurisdictional and requires the elements of injury-in-fact, causation, and redressability to be pleaded and proved. While much could be argued here as to each element, the Ninth Circuit's decision was limited to redressability. The Ninth Circuit's decision did refer to and seemed to accept that the other elements of standing were met, except for footnote 3 and its language dealing with and denying "procedural injury". "Procedural injury" is but one of many tests devised by this Court to determine standing and cannot be considered as conclusive on either of the "injury-in-fact" or "causation" elements. The conclusion of the Ninth Circuit was on the issue of redressability, and, that being the case, this Petition is limited in its scope to review the issue of standing as to its element of redressability.

The principal flaw in both the District Court's and Ninth's Circuit decision is that both Court's assumed as an alleged legal matter and without any factual basis to support

it that the Secretary of the Navy had "discretion" where to place THE MO even if the statute were unconstitutional. Again, these decisions were based on a CR 12(b)(1) motion to dismiss, and the pleadings are what determine whether a claim is stated. If a claim is stated by the allegations, the facts as alleged are accepted as true for a 12(b)(1) motion. *Steel, supra*. MOM has alleged facts which show that the injury can be redressed. It must be remembered that MOM filed its action in District Court asking for Declaratory Relief, and this action was filed *before* THE MO was towed to Hawaii. Given the nature of this action and after hearing the evidence, the District Court could find the alleged donation statute unconstitutional or that MOM is entitled to relief for other reasons, overturn the Secretary's decision, and exercise its *inherent power* to order THE MO returned to Bremerton, if for no other reason that to restore the *status quo ante*.[6]

6. A serious issue abiding said hearing is the good faith compliance of the MMA proposal with the Secretary of the Navy's own regulations and instructions and the acceptance by the Secretary in conformance with the same. Despite valiant efforts made by the Washington Congressional delegation, MOM, and others, a complete, non-redacted copy of the MMA proposal has never been obtained. The one obtained was redacted to such degree as to provide no information at all. For reasons that are a mystery and lacking any legal support, the Secretary of the Navy has been zealous in blocking any effort to obtain the MMA proposal or to disclose the same. A CR 33 Request for Production of Documents is pending reversal of the decisions of the Courts below for this purpose. A District Court upon seeing the proposal and its acceptance may very well conclude that the proposal itself violates the Secretary's regulations and instructions. If that be the case, as it seems likely, the District Court may very well order THE MO returned to Bremerton, if only by reason of essential justice and fairness. The District Court in its opinion listed at length the number of authorities who have allegedly reviewed the proposal. (App. B at pp. 5a-6a). This listing

(Cont'd)

Neither the District Court nor the Ninth Circuit admitted that it had such inherent power.

Exercising such power would find great support in factual reality and common sense. THE MO was moored at the Naval Inactive Ship Maintenance Facility at Bremerton where it had the support services in the form of pier length, repair, maintenance, provisioning, security, access, and manpower under available Navy resources; whereas, it is undisputed that the Navy has no such resources in Hawaii. In point of fact, Bremerton is the only place on the West Coast under Navy authority (or probably any other authority, either military or civilian) which could provide the total resources the Navy would need to moor THE MO. In Hawaii, MMA, having essentially sealed off the vessel, utilizes the ship as a museum. The Secretary plainly could not leave THE MO in Hawaii, and Bremerton is the only place he could receive it. His alleged "discretion", if any (especially in the face of court order requiring return), is thus limited by reality.

Both courts below assumed their respective conclusion without the proper facts and argument, or even on the arguments made before them. Both Courts eschewed their existing *inherent power* to redress *this* matter and used the motion to dismiss on standing as surrogate for deciding a question on the merits after a full and complete hearing. *See Steel, supra.*

(Cont'd)
is a half-truth. No authority has reviewed the allegedly *accepted* MMA proposal. It is undisputed that none of the reviewing authorities considered the constitutional and statutory arguments made herein. These reviews, at best, were made on hearsay and incomplete information.

10 U.S.C. § 7306 is unconstitutional, and the elements for redressability have been pleaded properly and can be shown at hearing by MOM.

II. THE SECRETARY OF THE NAVY LACKS THE POWER TO DONATE BATTLESHIPS SINCE THAT POWER UNDER STATUTE RESIDES IN THE GENERAL SERVICES ADMINISTRATION.

The District Court below failed to address a powerful and compelling argument made by MOM that the Secretary of the Navy has no authority to donate a vessel which has been stricken, including a battleship. The Ninth Circuit made only oblique reference to this argument in citing to a statute in 40 U.S.C. § 472(d)(2), at footnote 4, a statute upon which no one in authority had previously relied. That statute has no relevance to the Secretary's authority for two reasons set forth below.

To frame the reasons and to emphasize once again, this Court must recognize that the argument here is one of first impression, and, as to this Argument, who has the authority to dispose of battleships stricken from vessel registry? Except for the unreported decision of the Ninth Circuit below, there is no reported case authority whatsoever, and none others known which are unreported, dealing with statutory or regulatory procedure or the rights of the military service secretaries and the General Services Administration to dispose of military property.

As to the first reason, 10 U.S.C. § 7306 is ostensibly the authority under and by which the Secretary of the Navy allegedly acts to donate battleships. Yet, his authority is circumscribed by a "Section 602 of the Federal Property and

Services Act of 1949". There was no Section 602 in the 1949 Act, and there is none presently. No one knows what the Congress intended by this reference and its lack of enactment in the said Act. In the absence of this Section 602, the Secretary cannot act since his authority is circumscribed and how and to what extent no one knows.

As to the second reason, the Secretary's authority is further circumscribed by 40 U.S.C. § 474 (cited to in the alleged donation statute, 10 U.S.C. § 7306) wherein this statute provides authority to the Administrator of General Services to dispose of property "in addition to and conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith. . . ." Under such authority, the Administrator has adopted 41 C.F.R. § 101-44. 108-9(b)(2)(iii) preventing donation of, among other vessels, battleships. Why would the Administrator adopt such regulation if he or she did not anticipate that he or she would be the authority to dispose of stricken vessels? Donation of a battleship is, of course, exactly what the Secretary of the Navy did. Furthermore, the exceptions set forth in § 474 *would not permit donation of any vessel, including a battleship*. If there is conflicting language between § 472 (erroneously relied upon by the Ninth Circuit and by no other known authority) and § 474, the language of § 474 would on its face preclude the application of § 472.

Since neither court below has ruled on the application of these statutes and regulations, it is difficult to determine at this time whether standing, as alleged, is or would not be an issue to assert this claim. Mom would argue that the first two elements of standing are met, and assuming redressability applies to this argument, Petitioner will rely on arguments previously made above on this element and relies on its argument as to relief.

MOM has the right to have this issue fairly considered since statute and regulation providing the exact relief on the merits which MOM seeks are dispositive. Neither Court below did so. This Court can reconcile these two statutes by granting the within Petition and, since this is a matter of first impression, this Court should do so.

40 U.S.C. § 474 vests responsibility for disposal of a vessel in the Administrator of the General Services Administration, and under that Administrator's own regulation, 41 C.F.R. § 101-44.108-9(b)(2)(iii) precludes donation of a battleship.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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